

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 21, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**JOHN J. FOX,
Claimant Below, Petitioner**

**vs.) No. 100806 (BOR Appeal No. 2044121)
(Claim No. 990071699)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent**

and

**MOUNTAINEER MANUFACTURING, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 9 2010, in which the Board affirmed a February 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of Mr. Fox's request for an independent medical examination related to his depressive disorder. The appeal was timely filed by the petitioner and a response was filed by the Office of Insurance Commissioner. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition, response, and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of

Appellate Procedure.

The Board of Review affirmed the holding that Mr. Fox was not entitled to an independent medical examination for his depressive disorder diagnosis due to Mr. Fox failing to file an application for the depressive disorder within the five year statute of limitations. Mr. Fox asserts the application for an independent medical examination was improperly denied since his treating physician did not opine maximum medical improvement until March 24, 2008. During the Office of Judges hearing Mr. Fox acknowledged he was originally awarded permanent partial disability on April 24, 2004 for his compensable injury. Thereafter, Mr. Fox received treatment for the depressive disorder but did not file for an independent medical examination until May 13, 2009. The Office of Judges held that “[b]ased upon a review of the record and a review specifically of W.Va. Code § 23-4-16(a)(2) it is determined that the statute does not distinguish permanent partial disability from any other type of reopening issue, thus the claimant’s request must be made within five years of the initial award.” (February 12, 2010 Office of Judges Order, p. 5). The Office of Judges, too, found no basis for further ward or for disputing the Claims Administrator’s findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 9, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner’s request for an independent medical examination related to depressive disorder is affirmed.

Affirmed.

ISSUED: July 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Menis E. Ketchum

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin